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No. 458

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

BEN POLIKOFF,

Petitioner,

vs.

MAURICE S. LEVY, LOUIS C. RAPPAPORT, HARRY MILLER and SIDNEY MILLER,

Respondents.

On Petition for a Writ of Certiorari to the Appellate Court of Illinois First District

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SUPPLEMENTAL BRIEF FOR THE RESPONDENTS IN OPPOSITION

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To The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Respondents, Maurice S. Levy, Louis C. Rappaport, Harry Miller and Sidney Miller, submit this Supplemental Brief for the Respondents in Opposition.

I.

LIMITATIONS BAR CAN BE RAISED FOR FIRST TIME ON ANY APPEAL

Petitioner's Reply Brief questioned the right of the respondents to raise the Federal limitations bar for the first time on appeal in this court.

Even if this limitations point had been raised in the trial court, the fatal bar of limitations would have been incurable.

This one year limitations bar is jurisdictional as to the subject matter of plaintiff's Federal action as was pointed out in respondents' original brief at Page 4.

This jurisdictional objection can be raised for the first time on appeal. (5 Am. Jur. 2d "Appeal and Error" p. 61, Sec. 593, Note 8; 4 C.J.S. "Appeal and Error" pp. 782-3, Sec. 258, Notes 85.50, 85.55, 86)

II.

OFFER OF CORPORATE STOCK TO PETITIONER WAS NO PART OF ORIGINAL TRANSACTION UNDER WHICH THE PETITIONER MADE HIS PAYMENTS

The petitioner made his last payment amounting to $7,500.00 on the original offer. The respondent, Levy, acknowledged receipt of this payment by his letter of December 7, 1960. (Abst. 10)

One year and almost two months later, on or about February 3, 1962, the petitioner charges that the defendants caused a corporation to be formed, and the petitioner refused to accept stock in the corporation for his previous payments. (Abst. 14)

The later formation of the corporation was no part of the original offer between the parties. As pointed out in the respondents' original brief at pages 18 and 19, it is obvious that this corporation was formed as a convenience to the project, and the joint venture between the parties continued, notwithstanding the formation of the corporation. All of the petitioner's rights under the joint venture have been preserved, particularly in view of his refusal to accept the corporate stock. The petitioner was not induced to make any of his payments by any promise of the respondents to offer him any corporate stock.

The petitioner's claim of rescission and return of his payments is based on his alleged failure to receive a contract he claims was promised to him, and is not based on his refusal to accept the corporate stock.

The refusal of the petitioner to accept the corporate stock is of no relevancy to petitioner's claim.

CONCLUSION.

Petitioner's Federal claim is barred by limitations. He is still a member of a joint venture that is not subject to any Federal Securities Act.

His petition is totally devoid of merit and should be denied.

Respectfully submitted,

NAT M. KAHN,
Counsel for Respondents